STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 9, 2009
v	No. 285260 Wayne Circuit Court
CHARLES LEQUENTIN FORD, Defendant-Appellant.	LC No. 07-014789-FC

Before: Owens, P.J., and Servitto, and Gleicher, JJ.

PER CURIAM.

Defendant appeals by right his bench trial convictions of carjacking, MCL 750.529a, and two counts of armed robbery, MCL 750.529. We affirm.

Gerald Washington testified he received a phone call from an individual who identified himself as "JR," who wanted to buy a pair of Gucci shoes. Washington, who sold shoes and other merchandise from his car, made arrangements to meet "JR" at an address in Detroit. When Washington and his wife, Kalena Trammer, arrived at the home, defendant and another individual armed with a shotgun took the car, which contained approximately 20 pairs of shoes. The men also took Washington's wallet, cell phone, and keys.

Washington contacted the police; however, Washington and a friend later arranged to have the friend attempt to purchase shoes from defendant, who had apparently kept Washington's cell phone. The friend called the cell phone number and arranged to meet defendant at a nearby gas station. When she arrived, the friend recorded defendant's license plate number and provided it to Washington, who was parked nearby. Washington called the police and provided them with a description of the car, defendant, and the license number. A Detroit police officer discovered the vehicle five or ten minutes later. The occupants had no cell phone or shoes when they were detained.

Defendant first argues that trial counsel provided ineffective assistance when he neglected to obtain Washington's cell phone records. Defendant notes that neither he nor his acquaintance were found with a cell phone, despite the fact that they were stopped shortly after Washington's friend allegedly called defendant, and defendant maintains that the cell phone records would have completely exonerated him.

"Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id*. "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id*. Because no *Ginther*[1] hearing was held, our review of defendant's claim is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

"Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy. . . ." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). While defendant contends that the phone records would have exonerated him, his contention is mere speculation. Defendant provides no facts in support of his argument. Moreover, during trial, defense counsel questioned Washington about his own inability to obtain the records, or to have the police obtain them, to support Washington's claim that defendant robbed him. Defense counsel then argued that the prosecution's lack of any evidence to tie defendant to the cell phone, among the other gaps in the prosecution's case, created a reasonable doubt of guilt. The fact that defense counsel's apparent strategic decision did not work does not render its use ineffective assistance. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Defendant has not met his burden of showing that defense counsel made an outcome determinative error in failing to obtain the complainant's cell phone records for use at trial.

During trial, Trammer, who grew up nearby the location where the incident occurred, testified that she recognized defendant. Trammer also stated that she remembered that defendant had a scar on his cheek when he was younger, although she did not notice the scar at the time of the robbery. Defendant asserts that trial counsel provided ineffective assistance by failing to call witnesses or to enter physical evidence that defendant never had a facial scar. Defendant provides an affidavit from appellate counsel stating that defendant's family provided him with photographs of defendant "and other information" that establishes that, contrary to Trammer's testimony, defendant never had facial scars.

Even if we were to find that our review is not limited to mistakes apparent on the record, see *Cox*, *supra* at 453; *Williams*, *supra* at 414, we have not been provided with anything other than appellate counsel's affidavit concerning the photographs and "other information". We further note that, instead of questioning the family as to whether defendant ever had a scar, trial counsel opted to elicit testimony from one of the arresting officers that defendant had no visible scars when he was arrested. Defense counsel also pointed out in closing that defendant bore no such scar, which is something that the trial court could have observed at trial. Defense counsel's apparently strategic decision was not unreasonable. Under the circumstances, defendant cannot

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

show that, had defense counsel provided additional information on this point, it is reasonably probable that the outcome of the trial would have been different.

Affirmed.

/s/ Donald S. Owens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher